Supreme Court, U.S.
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Docket No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, *et al*, Petitioners

v.

JESUS GARCIA DELGADO, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF PROCEDURE AND FACTS 6

ARGUMENT 10

I. Denial Of Counsel At Sentencing 10

II. Conflict Of Interest Of Co-Defendant's Counsel Who Purported To Submit Respondent's Sentencing In The Absence Of Respondent's Attorney 11

III. Failure Of Prior Appellate Counsel To Raise Either Of The Issues In I And II Above 13

IV. Response To Petitioners' Claims 15

A. Merits 15
B. Petitioners' AEDPA Claims 24

SEPARATE GROUNDS FOR AFFIRMANCE 30

TABLE OF AUTHORITIES

CASES

Anders v. California, 386 U.S. 738 (1967) 1, 5, 8, 10, 15-20, 22-24, 27-29

Burgett v. Texas, 389 U.S. 109 (1967) 26

Cardwell v. Greene, 152 F.3d 331 (4th Cir.),
cert. denied, 67 U.S.L.W. 3374 (U.S. Dec. 3, 1998) 28

Conway v. California Adult Authority, 396 U.S. 107 (1969) (per curiam) 5, 11

County of Kern v. Diller, 69 Cal.App.4th 1412,
82 Cal.Rptr.2d 318 (1999) 5

Davis v. Jacobs, 454 U.S. 911, 919 (1981) 11

Delgado v. Lewis, 181 F.3d 1087 (9th Cir. June 23, 1999) 6, 9, 11, 28

Ellis v. United States, 356 U.S. 674 (1958) 19, 20, 22, 29

Evitts v. Lucey, 469 U.S. 387, 396 (1985) 13, 17, 22, 30

Gelfuso v. Bell, 590 F.2d 754, 755 (9th Cir. 1978) 27

Glasser v. United States, 315 U.S. 60 (1942) 2, 12

Golden v. Newsome, 755 F.2d 1478 (11th Cir. 1985) 2

Gray v. Estelle, 616 F.2d 801 (5th Cir 1980) 12

Harris v. Nelson, 394 U.S. 286 (1969) 30

Henderson v. Morgan, 426 U.S. 637 (1976) 12

Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997) 28

Herbert v. Billy, 160 F.3d 1131 (6th Cir. 1998) 28

Herring v. New York, 422 U.S. 853 (1975) 18, 20

Hollman v. Wilson, 158 F.3d 177 (3d Cir. 1998) 27

In re Sade C., 13 Cal.4th 952, 55 Cal.Rptr.2d 771, 920 P.2d 716 (1996) 5, 15, 16, 23

Johnson v. Zerbst, 304 U.S. 458 (1938) 12

Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995) 2

McCoy v. Court of Appeals, 486 U.S. 429 (1988) 17, 18

McLee v. Angelone, 967 F.Supp. 152 (E.D. Va. 1997) 28

Mempa v. Rhay, 389 U.S. 128 (1967) 2, 10

Moya v. United States, 745 F.2d 1044, 1048 (7th Cir. 1984) 3

Northwestern Indiana Telephone Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989) 3

Patrasso v. Nelson, 121 F.3d 297 (7th Cir. 1997) 2

Penson v. Ohio, 488 U.S. 75 (1988) 5, 8, 15-19, 21, 23-25, 27-29

People v. Barton, 21 Cal.3d 513, 146 Cal.Rptr. 727, 579 P.2d 1043 (1978) 21

People v. Feggans, 67 Cal.2d 444, 62 Cal.Rptr. 419, 432 P.2d 21 (1967) 16

People v. Mroczko, 35 Cal.3d 86, 197 Cal.Rptr. 52, 672 P.2d 835 (1983) 12

People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979) 5, 15-17, 23

Powell v. Alabama, 287 U.S. 45 (1932) 22

Reno v. Flores, 507 U.S. 292 (1993) 30

Smith v. Robbins (U.S. No. 98-1037, cert. grd. March 8, 1999) 23

State v. Balfour, 311 Or. 434, 814 P.2d 1069 (Ore. 1991) 23

Strickland v. Washington, 466 U.S. 668, 692 (1984) 2, 10, 14, 26, 29

Tucker v. Day, 969 F.2d 155 (5th Cir. 1992) 2

United States v. American Ry. Express Co., 265 U.S. 425 (1924) 1, 11, 13, 14, 30

United States v. Arthur Young & Co., 465 U.S. 805 (1984) 30

United States v. Balough, 820 F.2d 1485 (9th Cir. 1987) 2

United States v. Breckenridge, 93 F.3d 132 (4th Cir. 1996) 2

United States v. Cronic, 466 U.S. 648 (1984) 2, 4, 10, 17, 18, 26, 30

United States v. Daniels, 558 F.2d 122 (2d Cir. 1977) 2

United States v. Gonzales, 113 F.3d 1026 (9th Cir. 1997) 2, 10

United States v. Mateo, 950 F.2d 44 (1st Cir. 1991) 2

United States v. Salemo, 61 F.3d 214 (3d Cir.), *cert. denied*, 516 U.S. 1001 (1995) 2

United States v. Taylor, 933 F.2d 307 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991) 2

Von Moltke v. Gillies, 332 U.S. 708 (1948) 12

Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989) 3

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 30

Wilson v. Moore, 178 F.3d 266 (4th Cir. 1999) 28

Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 23

Wood v. Georgia, 450 U.S. 261 (1981) 11

STATUTES

28 U.S.C. § 2254 . . . . . 25, 29

California Penal Code § 1237.5 7

CONSTITUTIONS

U.S. Const., 6th Amend. 17, 28

U.S. Const., Art. I, § 9 30

COURT RULES

Cal. R. Ct. 12 21

Cal. R. Ct. 29 25

Cal. R. Ct. 33 21

OTHER AUTHORITIES

"Fed. Judge Blasts Calif. Defense Pair,"
National Law Journal (March 22, 1999) 1

INTRODUCTION

In a petition most noteworthy for what it omits, petitioners ask this Court to grant certiorari to render an advisory opinion. For irrespective of what happens on the *Anders v. California*-related issues which are the only issues petitioners address, the District Court's conditional grant of habeas corpus must ultimately be affirmed. Whatever happens with the petition, there remain issues--easy issues to spot, which were raised below--which would inevitably result in affirmance even if this case returned to the Court of Appeals. *See United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). The simplest are:

(1) Respondent was totally denied counsel at sentencing, when his own appointed attorney failed to show up and also submitted no written materials on respondent's behalf; and

(2) Prior appellate counsel was ineffective in failing to raise that issue.

After respondent's attorney was a no-show at his sentencing, the attorney for a co-defendant--who was obtaining a superb result for her own client--purported to "stand in" for respondent. But like respondent's own attorney, the purported "stand-in counsel" didn't do anything on respondent's behalf. She just said: "Submitted." No one told respondent he could have his own attorney at his sentencing, let alone an attorney who would actually represent his interests. The result was a denial of counsel, and a breakdown of the adversarial system.

If there were any doubt that respondent's counsel didn't show up for his sentencing and another attorney ostensibly "stood in" but did nothing, respondent quotes petitioners' counsel: "Having somebody stand in is very common in the trial courts, certainly in the context of a . . . sentence." "Fed. Judge Blasts Calif. Defense Pair," *National Law Journal* (March 22, 1999), p. A6 [copy attached as Appendix B]. Thus, petitioners acknowledge that is what happened.

Far from "very common," it is virtually nonexistent. So it should be, since a defendant has the right to the advocacy of counsel at sentencing. That right is patently denied when the defendant's counsel doesn't show up and submits nothing in writing, and a co-defendant's attorney purports to "stand in" but also does nothing. Respondent attaches a transcript of what "stand-in counsel" did on respondent's "behalf" at sentencing, RT 44-45, as Appendix A.

It is long settled that if a defendant is totally denied the benefit of counsel at a critical stage of his proceedings, the defendant must be granted a single proceeding with the benefit of counsel. Sentencing is a critical stage of proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967); *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997); *United States v. Breckenridge*, 93 F.3d 132, 135 (4th Cir. 1996); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995). Denial of counsel at a critical stage is reversible *per se*. *United States v. Cronic*, 466 U.S. 648, 659 n. 25 (1984), and seven cases cited; *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Glasser v. United States*, 315 U.S. 60, 76 (1942).

Thus it is clear that denial of counsel at sentencing is reversible *per se* as to sentencing, and the defendant remains entitled to a single sentencing with benefit of counsel. *E.g., Mempa v. Rhay*, 389 U.S. at 137; *Patrasso v. Nelson,* 121 F.3d 297, 304 (7th Cir. 1997); *United States v. Salemo*, 61 F.3d 214, 221-22 (3d Cir.), *cert. denied*, 516 U.S. 1001 (1995); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992); *United States v. Mateo*, 950 F.2d 44, 48-50 & nn. 8-9 (1st Cir. 1991); *United States v. Taylor*, 933 F.2d 307, 311-12 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991); *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987); *Golden v. Newsome*, 755 F.2d 1478, 1482-83 (11th Cir. 1985); *United States v. Daniels*, 558 F.2d 122, 127 (2d Cir. 1977).

In short, respondent is still entitled to that single sentencing with benefit of counsel, and will inevitably be granted that most basic of constitutional guarantees at some point, no matter how the issues in the current petition are resolved in other cases.

Petitioners have never claimed otherwise, despite numerous opportunities. In the Court of Appeals, respondent raised this issue in his Appellee's Brief (at 42-53). Petitioners would have had to respond in the Reply Brief to avoid waiving the issue. *See, e.g., Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (argument could not be made for first time on remand from this Court, citing Wright and Miller and other authority), *cert. denied*, 493 U.S. 1035 (1990); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988) (same), *cert. denied*, 490 U.S. 1006 (1989); *Moya v. United States*, 745 F.2d 1044, 1048 (7th Cir. 1984) (same). They didn't. So too when respondent raised this issue after the Court of Appeals's opinion, *see* Memorandum of Points and Authorities in Opposition to Motion for Continued Stay of Mandate, at 4, 7, 14, 16-17; Memorandum of Points and Authorities in Support of Request for Disposition of Appellee's Opposition to Stay, at 12-15: Petitioners never took issue with respondent's characterization of the facts or law.

The only real issue is how much longer respondent's case will be delayed before he gets that one sentencing with counsel. So far, it has been 4 1/2 years since respondent was sentenced without benefit of counsel. And although it shouldn't matter, this wasn't a proceeding on a stipulated sentence where counsel wouldn't have had much to do. Respondent was given the opportunity along with five other defendants to make a case for less than the maximum term under the plea agreement, and three of the five--all of whom had the benefit of counsel, of course--did obtain less than the maximum term.

Denial of counsel is perhaps the single most fundamental defect there could be in a criminal proceeding. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. at 654. Here, not only was respondent denied counsel at sentencing, prior appellate counsel then failed to raise this easy issue. The adversarial system broke down at sentencing, and then broke down again on appeal.

There is also the issue of co-defendant's counsel who purported to "stand in and submit" having a major conflict of interest. That issue was also not difficult to spot or discuss, though it is secondary to the denial of counsel because the purported "stand-in counsel" didn't do anything on respondent's behalf either. And although respondent supports the Court of Appeals' opinion in his case, he doesn't need any of the Court of Appeals' opinion to stand in order to prevail, because of the other issues adverse to petitioners as described above.

The instant petition seeks to add delay on top of delay in getting this case to where the Constitution clearly requires it to be, a grant of a single sentencing with benefit of counsel. That is all respondent seeks. On such a fundamental, basic issue, truly, "[j]ustice delayed is justice denied." John Bartlett, Bartlett's Familiar Quotations 446 (16th ed. 1992) [Prime Minister William Gladstone (1809-1898)].

With all of the above adverse issues squarely in their way--issues which petitioners have never contested, on either the facts or the law, and have by now waived--petitioners have instead taken the approach of simply ignoring them. Respondent does not agree that such major omissions should be rewarded with a grant of certiorari. Respondent respectfully asks this Court to follow its approach in another case, where the petitioner failed bring to this Court's attention adverse matters which would inevitably be fatal to the petitioner's cause:

"Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) (per curiam).

Finally, on the issues addressed in the petition, petitioners make claims about California's law on "no-merit briefs" that are not true. They ascribe to *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979) a procedure contrary to *Anders v. California*, 386 U.S. 738 (1967) that isn't anywhere in *Wende*, and which the California Supreme Court doesn't at all follow. The state Supreme Court follows *Anders*, as confirmed by its recent opinion in *In re Sade C.*, 13 Cal.4th 952, 55 Cal.Rptr.2d 771, 920 P.2d 716 (1996). *See also County of Kern v. Diller*, 69 Cal.App.4th 1412, 1418-20, 82 Cal.Rptr.2d 318 (1999) [*Wende* merely follows and is no broader than *Anders v. California*; following *Sade C.*]. Petitioners thus claim a conflict between the Ninth Circuit's opinion in this case and California law which is simply nonexistent, as both the Ninth Circuit and the California Supreme Court follow this Court's opinions in *Anders v. California*, 386 U.S. 738, and *Penson v. Ohio*, 488 U.S. 75 (1988). Petitioners also seriously misinterpret the Court of Appeals' opinion in this case, again seeking to create a "conflict" that simply doesn't exist.

Petitioners' omissions are numerous and material, and their petition seeks "relief" that is artificial and not substantive. That alone warrants denial of the petition. On top of that, petitioner's interpretation of California law and the Ninth Circuit's opinion doesn't hold water.

Respondent asks that the petition be denied.

STATEMENT OF PROCEDURE AND FACTS

The facts of the case are well stated in Judge Thomas's opinion for the Court of Appeals, *Delgado v. Lewis*, 181 F.3d 1087, 1089-90 (9th Cir. June 23, 1999), to which this Court may refer. In case it is of assistance, respondent briefly recounts the facts which appear most pertinent here. (References generally are to the Court of Appeals excerpts of record ["ER"]; other references are to documents filed in the California state proceedings.)

As part of a six-defendant information, Mr. Delgado was charged with manufacture of methamphetamine and related offenses. ER 26, 188. After a motion to suppress evidence and other pretrial motions were heard and denied, *see* ER 97, 99, the six defendants all entered into plea agreements. ER 133-39. In return, the trial court agreed to impose sentences with specified maximums, and to consider any materials and argument presented in support of sentencing below the maximum. ER 128-32.

For sentencing, counsel for five of the six defendants presented documents and arguments for mitigation in briefs, at the sentencing hearing, or both. ER 147-50, 161-69, 171-74, 177-78, 181-85. Three of those five defendants received sentences well under the trial court's stated maximum. ER 175, 179, 181-86.

Alone among the six defendants, Mr. Delgado had no presentation in mitigation made on his behalf. No sentencing brief or other documents were filed, and no witnesses or argument were presented at sentencing. ER 157-59. In fact, Mr. Delgado's appointed trial counsel was a total no-show at the sentencing hearing. ER 140, 143, 357. He also had been a no-show at Mr. Delgado's preliminary hearing, and had relied on a co-defendant's attorney to explain the guilty plea form to Mr. Delgado. ER 357.

At sentencing, one of the co-defendant's attorneys purported to act as "stand-in counsel." ER 143. This attorney had a major conflict, as she had obtained a court commitment of probation for her own client over the prosecutor's strong objection. ER 181-85, 357-58. When asked if "stand-in counsel" was OK, Mr. Delgado, who understood little English and had limited education in rural Mexico, said yes. ER 143, 188, 295. No effort was made to explain that he had a right to his attorney or could continue the hearing for that purpose, or the existence or nature of "stand-in counsel's" conflict. ER 143. "Stand-in counsel" merely submitted Mr. Delgado's sentencing, before securing probation fort her own client. ER 158, 182, 185. It is unclear whether Mr. Delgado had an interpreter at that time.

With no argument in mitigation on his behalf, Mr. Delgado received the maximum sentence permitted by the plea agreement, 15 years. ER 159.[1]

Subsequently, Mr. Delgado's appointed trial attorney obtained a certificate of probable cause, ER 113, California's requirement for permission to appeal most types of issues after a guilty plea. Cal. Pen. Code § 1237.5. A notice of appeal was filed with the certificate. ER 112. Another attorney was appointed for the appeal, on an "independent" basis. ER 201.

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[1] Despite the total absence of advocacy at sentencing, even this undeveloped record contains facts that would have given an advocate ample basis for argument in mitigation. Importantly, as the Ninth Circuit pointed out, Mr. Delgado, then 45, had no known criminal record. 181 F.3d at 1090; *see also* ER 231, 251. Beyond that, Mr. Delgado told the probation officer he and his wife were originally hired to do menial labor at the ranch where the meth lab was later set up, *i.e.*, maintenance and taking care of the animals. ER 194. Mr. Delgado fully admitted participation in the manufacturing operation, albeit a subsidiary role—he washed buckets of chemicals, and dumped buckets of methamphetamine liquid into strainer containers, doing what he was told (a role befitting someone who apparently shoveled animal manure). ER 193-94. Delgado's admission of responsibility, however, impressed the judge and persuaded him Delgado was telling the truth, at least to a substantial extent and more than any other defendant. ER 163-64.

Mr. Delgado's appellate attorney received a record that was missing the suppression motions and transcripts, some of the other preplea proceedings, and other relevant documents. *See* Application to Augment the Record on Appeal [post-grant of habeas], Cal. Ct. App. No. E016476, Oct. 14, 1997, at 2-9 (copy attached as Appendix C). The attorney did not request to augment the record to include these materials. *See ibid.*

The attorney told Mr. Delgado his appeal was "simply worthless." ER 256. The attorney then filed a no-merit brief, ER 201-13, with a short statement of procedure and prosecution evidence from the preliminary hearing, which failed to set forth any legal points, authority, or "anything [else] in the record that might arguable support the appeal." *Penson*, 488 U.S. at 80; *Anders*, 386 U.S. at 744. The no-merit brief asked the court to review the record, and included a declaration saying the attorney read the record and wasn't moving to withdraw. ER 201-13.

Through a "jailhouse lawyer," Mr. Delgado filed a *pro. per.* supplemental brief, arguing among other things that no one spoke on his behalf at his sentencing hearing, no one introduced anything on his behalf, his attorney didn't even show up, and "some woman" (a co-defendant's attorney) purported to stand in his attorney's place. ER 214-24. The Court of Appeal opinion recited a short procedural history, made no legal analysis, and concluded: "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." ER 226-28 (reprinted at Petn. App. E, at A-45 - A-47).

Now *pro. per.* and in prison, and without any transcripts (since his attorney hadn't sent them, *see* ER 358-59), Mr. Delgado filed a handwritten petition for review in the California Supreme Court. ER 230-31. The petition was denied without opinion. ER 235. Then, with the

help of a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus in the California Supreme Court, alleging among other things that he couldn't read, write or speak English, and that his appellate counsel was ineffective and also never gave him his transcripts; and also repeating arguments from his *pro. per.* papers on appeal. ER 236-42. That petition was also denied without opinion. ER 257.

Again aided by a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus with the U.S. District Court for the Central District of California. ER 258. The District Court granted the writ conditionally, subject to the State accepting jurisdiction over Mr. Delgado's appeal and appointing new counsel. ER 367.

On September 2, 1997, the California Fourth District Court of Appeal reinstated Mr. Delgado's appeal and appointed new counsel (the undersigned). Supp. ER 21. However, it later stayed the appeal in mid-briefing, over objection, a stay that has now been in effect for some 16 months. 2d Supp. ER 67-68, 75-93.

On February 22, 1999, the (federal) Court of Appeals affirmed the District Court's conditional grant of habeas corpus. *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999, withdrawna and superseded on denial of rehearing). The State petitioned for rehearing.

On June 23, 1999, the Court of Appeals denied the petition for rehearing, and filed a modified opinion. *Delgado v. Lewis*, 181 F.3d 1087 (9th Cir. June 23, 1999). (Petitioners' characterizations of the original opinion in their procedural section, Petn. at 5, should be disregarded and stricken, because (i) they are argument and (ii) the original opinion was withdrawn and is a legal nullity.)

The State's petition for certiorari was filed on September 17, 1999.

ARGUMENT

I. Denial Of Counsel At Sentencing

As discussed above, Mr. Delgado was totally denied the benefit of counsel at sentencing. Sentencing is a critical stage of proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967). Denial of counsel at a critical stage is reversible error *per se*. *United States v. Cronic*, 466 U.S. at 659; *Strickland v. Washington*, 466 U.S. at 692; *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997).

Thus by established law, denial of counsel at sentencing is reversible *per se*--not that the verdict should be reversed, but that the sentence should be reversed so the defendant can have a single sentencing with benefit of counsel. Courts have uniformly agreed. *See, e.g.*, cases cited *supra*, p. 2.

Respondent raised this issue as an alternative ground for affirmance in the Court of Appeals. 9th Cir. Appellee's Br. 42-53. Petitioners failed to address it or even mention it in their reply brief, thereby waiving the issue. *See supra*, p. 3. It wouldn't matter anyway, because the issue was so clearly meritorious when respondent raised it in the Court of Appeals. It still is, and it would be equally meritorious on any remand.

In light of that, the petition for certiorari asks this Court to rule on issues (the *Anders*-related issues) that in the end can't make any difference. The Court of Appeals will still be duty-bound to grant relief on respondent's issue, such that respondent will obtain one sentencing with benefit of counsel. The District Court's judgment conditionally granting the writ of habeas corpus will thus inevitably be affirmed.

The instant petition thus asks for what is effectively an advisory opinion. It won't matter to the disposition of this case whether certiorari is granted or denied, for respondent

will still be entitled to a sentencing hearing with benefit of counsel, and petitioners have never contended otherwise. If it is appropriate to dismiss certiorari when the petitioner "misstate[s] the facts in his petition so as to create a purely artificial and hypothetical issue," *Davis v. Jacobs*, 454 U.S. 911, 919 (1981) (Rehnquist, J., dissenting) (citing with approval *Conway v. California Adult Authority*, 396 U.S. 107), then it is appropriate to deny certiorari when the petitioner omits key facts and law to try to create a purely artificial and hypothetical issue.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

II. Conflict Of Interest Of Co-Defendant's Counsel Who Purported To Submit Respondent's Sentencing In The Absence Of Respondent's Attorney

A second issue arising from the default of Mr. Delgado's trial counsel is the attempt of a co-defendant's attorney to "stand in" at sentencing, purportedly on Mr. Delgado's behalf. However, the "stand in" attorney didn't do anything for Mr. Delgado. She just purported to submit his sentencing. The co-defendant's attorney then finished getting her client an extraordinary result of probation over the prosecutor's strong objection. *See supra*, p. 7.

"Stand-in counsel" had a strong incentive not to rock the boat by getting a good result for a co-defendant, because that would increase the possibility the prosecutor would become fed up and pull out of the plea agreement, ruining her client's extraordinary result. That conflict, which should have been apparent to the trial court, *see Delgado v. Lewis*, 181 F.3d at 1094, was reversible error. *See Wood v. Georgia*, 450 U.S. 261, 271-74 (1981).

Instead of dealing with the conflict, the trial court sought to bypass it. The court noted Mr. Delgado's attorney was a no-show, and asked Mr. Delgado if the co-defendant's attorney

had permission "to specially act as [his] attorney in place of Mr. Haynal for the purposes of this judgment and sentence." Mr. Delgado, through an interpreter, said yes. RT 29:2-12.

While conflict-free representation can be waived, any waiver of such a fundamental right must meet the traditional standard of knowing, voluntary and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Every presumption is indulged against waiver of such fundamental rights. *Glasser v. United States*, 315 U.S. at 70.

Therefore, a defendant must know the existence and nature of the right to conflict-free counsel, know it can be exercised without undue burden, and understand the direct consequences of waiving it. *See, e.g., Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976); *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948).

For these reasons, when a court knows or should know of a possible conflict, it must determine that the defendant (1) has discussed the drawbacks of conflicted representation with counsel; (2) has been made aware of the dangers and drawbacks of conflicted representation; (3) knows of his right to conflict-free representation; and (4) voluntarily wishes to waive it. *People v. Mroczko*, 35 Cal.3d 86, 110, 197 Cal.Rptr. 52, 672 P.2d 835 (1983); *Gray v. Estelle*, 616 F.2d 801, 803-804 (5th Cir 1980). Routine inquiries uninformed by specific facts do not suffice. *Von Moltke v. Gillies*, 332 U.S. at 723-24.

Here, the trial court made no such inquiry. Nor did it try to determine whether Mr. Delgado was adequately informed of his rights. The record falls far short of the required detailed inquiry. It provides no assurance Mr. Delgado understood the nature—or existence—of his fundamental right to conflict-free counsel, or his right not to waive it.

Moreover, no one told Mr. Delgado that the purported "stand-in counsel" was going to do absolutely nothing for him at sentencing, just like his trial attorney.

Respondent raised this issue as well in his Appellee's Brief in the Court of Appeals (at 53-62). Like the denial of counsel issue, petitioners ignored the issue in their Reply Brief in the Court of Appeals. Their failure to respond to the issue was a waiver. *See supra*, p. 3. But waiver isn't necessary; the issue is clearly meritorious, and respondent is entitled to relief.

For this reason as well, the petition effectively asks for an advisory opinion. No matter how the issues in the petition are eventually decided, whether in this case or any other case, respondent will inevitably be entitled to his one sentencing with benefit of his own counsel. The discussion *supra*, pp. 10-11, is incorporated here by reference.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

III. Failure Of Prior Appellate Counsel To Raise Either Of The Issues In I And II Above

There is also the issue of ineffective assistance of prior appellate counsel in failing to raise the denial of counsel and conflict of interest issues above.

These were hardly obscure issues. Denial of counsel, in particular, is one of the most fundamental and easily spotted issues imaginable. Prior appellate counsel was patently ineffective in failing to raise it. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Moreover, there can be no tactical basis for filing a brief (in any format) that raises no issues at all, when such easily spotted and clearly meritorious issues are in the record. Prior counsel's

failure to raise these issues was prejudicial under the standards of *Strickland v. Washington*, 466 U.S. at 693-94, as the issues were meritorious, and any would have resulted in relief.

Respondent made this argument as an alternative ground for affirmance in the Court of Appeals, in his Appellee's Brief (at 42-43). Petitioners failed to address it, or even mention it, in their reply brief. That failure was a waiver of any opposition. *See supra*, p. 3.

There is no opposition that could be made anyway. What legal argument could there possibly be, to overcome the law that guarantees respondent one sentencing with benefit of counsel? The record makes clear respondent never got that, and petitioners have never claimed otherwise. Prior appellate counsel could and should have raised the issue in a merits brief, and was prejudicially ineffective in failing to do so.

For this reason as well, the petition effectively asks for an advisory opinion. No matter how the issues in the petition are eventually decided, whether in this case or any other case, respondent will inevitably be entitled to his one sentencing with benefit of his own counsel. The discussion *supra*, pp. 10-11, is incorporated here by reference.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

IV. Response To Petitioners' Claims

A. Merits

If this Court were to reach petitioners' claims, they have no merit.

To begin with, though it shouldn't matter (since the only issue in this Part should be the propriety of a brief without any advocacy), petitioners make various claims about what California courts require in no-merit briefs, wrongly dubbing their theory "California's *Wende* procedure." The petition then claims that the Court of Appeals disagreed with California law.

While this Court doesn't decide what state law is, since petitioners made the claims, respondent is obligated to answer: Both claims are patently in error. The California Supreme Court follows *Anders* and *Penson*. So did the District Court, and so did the Court of Appeals.

Petitioners claim that in *People v. Wende*, 25 Cal.3d 436, the California Supreme Court required a procedure contrary to *Anders v. California*, by which appointed appellate counsel who file a "no-merit brief" set forth only statement of procedure and evidence, and make no effort to provide any advocacy or analysis or to set forth spotted legal issues. Petn. at 11. [stating that *Wende* prohibits what *Anders* requires, appellate counsel "draw[ing] attention to 'anything in the record that might arguably support the appeal'"]. This is what petitioners call "California's *Wende* procedure" or a "*Wende* brief." Petn. at 5, 6, 7, 11, 12, 14, 15, 16, *etc.*

The California Supreme Court has no such "procedure," and never has. On the issue of whether appointed counsel filing a no-merit brief must engage in advocacy by setting forth legal issues or analysis for the Court, the *Wende* case merely followed *Anders*. *Wende*, 25 Cal.3d at 439-41 [describing and following *Anders*]; *accord In re Sade C.*, 13 Cal.4th at 980 [on issues of advocacy of counsel and contents of a no-merit brief, *Wende* required that "all

the steps required by *Anders* had to be taken"]; *Sade C.*, 13 Cal.4th at 981 [quoting *Anders*] ["[*Wende*] stay[ed] squarely in *Anders*' path, seeking to ensure that 'counsel acts in the role of an active advocate in behalf of his client.'"]; *see generally Sade C.*, 13 Cal.4th at 977-78 [discussing requirements of *Anders* favorably, as the law]; *Sade C.*, 13 Cal.4th at 979 [discussing an earlier California case {*People v. Feggans*, 67 Cal.2d 444, 62 Cal.Rptr. 419, 432 P.2d 21 (1967)}, which required a no-merit brief to discuss the law, as "a sound reading of *Anders*"]. Nor did *People v. Wende* state, require, or even permit what petitioners claim.

In particular, it is untrue that in *Wende* or anywhere else, "the California Supreme Court[] conclu[ded] that *Anders* does not obligate counsel to identify issues." Petn. at 12. Notably, petitioners never state what part of *Wende* or what other California Supreme Court opinion supposedly contains this holding. None exists.

If this Court had any doubt, respondent would respectfully urge it to review *Wende*, and especially, the state High Court's very recent opinion in *Sade C.* which recounts the history of that Court in *Wende* and related cases. What petitioners are claiming about the law set forth by the California Supreme Court--without stating where or how--simply doesn't exist.

Moreover, the Court of Appeals below didn't hold that "*Wende* is contrary to *Anders*." Petn. at 11. The procedure that the District Court held was contrary to *Anders* and *Penson*, in the judgment affirmed by the Court of Appeals, is the procedure used by prior counsel in this case. That is the procedure petitioners wrongly ascribe to *Wende*, by which appointed counsel filing a no-merit brief recites some facts and procedure, but doesn't spot issues, doesn't assist the reviewing court, and doesn't engage in advocacy. It is not a procedure which the California Supreme Court has ever required or permitted, in *Wende* or anywhere else.

But in the end it doesn't matter. For even if the state Supreme Court in *Wende* had required or permitted such a procedure, it is still patently contrary to *Anders* and *Penson*. Because prior appellate counsel in this case used a procedure contrary to *Anders* and *Penson*, the District Court correctly granted the writ. That is also why the Court of Appeals affirmed.

Petitioners try to distinguish this case from *Anders* by claiming prior counsel in this case did more than counsel in *Anders*, because counsel in this case also set forth "an extensive statement of the procedural and historical facts." Petn. at 11. Actually, prior appellate counsel here did virtually nothing, since he only recited some procedural history and historical facts, albeit none of the historical facts favorable to his client (discussed further below).

Beyond that, petitioners' claim is like trying to distinguish a black horse from a white horse. Neither in *Anders* nor in this case did appellate counsel provide any legal advocacy. Legal advocacy is a bedrock, fundamental requirement of the Sixth Amendment guarantee of counsel. *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988); *Evitts v. Lucey*, 469 U.S. at 394; *United States v. Cronic*, 466 U.S. at 654-56 & n.17; *Anders v. California*, 386 U.S. at 743. Reciting some facts and procedural history doesn't qualify.

Worse still in this case, prior appellate counsel didn't even bother to recite facts that were favorable to the defendant. His recitation was of facts favorable to the prosecution. Facts in mitigation of sentence which would have been favorable to the defendant can be found in footnote 1, *supra* p. 7. Some can also be found in the Court of Appeals opinion.

Most importantly, prior counsel's brief had no legal advocacy. Without legal advocacy, there is no legal representation. A high school student could read a record of this nature, and recite facts and procedure. But courts do not appoint teenagers to provide legal representation.

The task of a lawyer is far greater: It is zealous legal advocacy. In the context of a "no-merit brief," legal advocacy may be the "strange form of advocacy" described in *McCoy v. Court of Appeals*, 486 U.S. at 439 n.13, whereby counsel indicates that (s)he thinks an appeals is frivolous and thus doesn't argue any legal issues (because counsel doesn't see any issues to argue). But even if rather "strangely," counsel still engages in legal advocacy by "draw[ing] attention to anything in the record that might support the appeal." *Penson*, 488 U.S. at 81; *McCoy*, 486 U.S. at 430, 440; *Anders*, 386 U.S. at 744.

Without advocacy, the adversarial system--the bedrock foundation of our system of justice--disintegrates. *United States v. Cronic*, 466 U.S. at 656-57 ["[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."]; *Herring v. New York*, 422 U.S. 853, 862 (1975) ["The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."]. Thus, a no-merit brief must contain advocacy of counsel.

Even petitioners backhandedly acknowledge the unshakable requirement that appointed counsel must engage in advocacy. Petitioners quote this Court's *Penson* opinion: "[F]ailure to file a brief 'deprived the court of the assistance of an advocate in its own review of the cold record on appeal.'" Petn. at 13 [emphasis added] [quoting *Penson*, 488 U.S. at 82 n.5].

Exactly: The reviewing court, and the judicial system, require advocacy. That is respondent's point.

Similarly, petitioners quote this Court's opinions in *Penson*, 488 U.S. at 80, *McCoy*, 486 U.S. at 430, 440, and *Anders*, 386 U.S. at 744: "[C]ounsel [under *Anders*] . . . must

include . . . 'a brief referring to anything in the record that might arguably support the appeal.'" Petn. at 13 [emphasis added]. Exactly: That is the requirement of advocacy, again.

This Court has repeatedly required advocacy of appointed counsel--in *Penson*, in *Anders*, in *Ellis v. United States*, 356 U.S. 674 (1958), and in plenty of other decisions. The District Court didn't make up that requirement just for this case, nor did the Court of Appeals in affirming the District Court. Both courts followed this Court. So does the California Supreme Court. By contrast, the required advocacy didn't exist in the no-merit brief in this case. That is why the District Court granted relief, and why the Court of Appeals affirmed.

In a no-merit brief, advocacy in the form of an *Anders* brief fulfills two functions that allow a court to ensure the proper and constitutional working of the adversarial system:

(1) Evidentiary: It permits the reviewing court to verify that despite the no-merit brief, appellate counsel has reviewed the record carefully and has done his or her best to engage in issue-spotting and analysis in the discharge of his or her duties; and

(2) Advisory: It helps guide the court in the discharge of its duty of reviewing the record to verify counsel's conclusion that there are no arguable issues, so that the court can protect the integrity of its proceedings, as well as its own appointment of counsel.[2]

See Penson v. Ohio, 488 U.S. at 81-82 [describing these "twin functions of the *Anders* brief"].

These are functions which must be performed by the reviewing court, because appointed counsel cannot unilaterally decide the defendant is not entitled to the benefit of

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[2] It also fulfills a third function, which is that forcing counsel to put pen to paper often makes counsel more careful, and forces him or her to think about the case. *See Penson*, 488 U.S. at 81 n.4. That would have been useful here. If this case might have seemed to prior counsel to have no issues at first look, a more careful look--including proper record augmentation, as discussed below--would have revealed issues that were easy to find, and as basic and fundamental as issues could be.

counsel for arguing issues. *Anders*, 386 U.S. at 742-43; *Ellis*, 358 U.S. at 674-75. Only the court can decide that. But the court can only so decide when there are no arguable issues.

For the court to make that decision, it must determine for itself that there are no arguable issues. That is the court's job, not counsel's. The court needs the advocacy of appointed counsel to do so, because a court cannot fulfill its functions unless counsel fulfill theirs. Even in a no-merit brief situation, we still have an adversarial system, which means the court takes its guidance from the parties' advocacy. *Herring v. New York*, 422 U.S. at 862. Counsel cannot default on those duties of advocacy, just as the court can't default on its duties of evaluation which are necessarily dependent on the advocacy of counsel.

If a court receives a no-merit brief like the one in this case, the adversarial system breaks down, and the court cannot perform its essential functions. Rather, it becomes appointed counsel who decides the defendant is not entitled to any advocacy. That is neither the proper function of an attorney, nor an action which would be taken by a zealous advocate.

In this case, prior appellate counsel failed to spot two easily recognizable issues, total denial of counsel at sentencing, and conflict of interest of purported "stand-in counsel" at sentencing. Those issues are discussed in Parts I and II above, pp. 10-13.

Petitioners, however, praise the "no-merit brief" of prior appellate counsel, and also appear to say Mr. Delgado's *pro. per.* brief was a good substitute for a brief of counsel. Petn. at 12 [2d full par.]. Notably, petitioners omit any mention of the overwhelmingly obvious and basic legal issues prior counsel missed. And of course, they omit any mention of the fact that there is no advocacy in prior counsel's "no-merit brief." Petn. at A-49 - A-61 (App. G).

Petitioners also fail to mention that prior appellate counsel failed to discharge his duty of obtaining a complete record with which to determine that there were no arguable issues. Attached in Appendix C is a copy of a record augmentation motion filed by respondent's new appointed counsel (after the reinstatement of the state appeal following the District Court's grant of habeas), which requested the Court of Appeal to issue an order augmenting the record with materials either required by California law or perceived as useful to the appeal. The Court of Appeal granted the record augmentation motion in full--over the objection of petitioners, no less. Copies of those documents are attached as Appendixes D and E.

Prior appellate counsel, by contrast, asked for no augmented records--even though California law permitted, and in some cases required, that the record contain extra materials. *See* Cal. R. Ct. 12, 33(a)-(b); *see also People v. Barton*, 21 Cal.3d 513, 519-20, 146 Cal.Rptr. 727, 579 P.2d 1043 (1978) (as much as preparing a proper brief, a duty of appellate counsel is to request record augmentation or correction when the appellate record is incomplete). One can hardly assume prior appellate counsel did his job when he engaged in no advocacy, missed routine meritorious issues, and wholly failed to obtain a proper appellate record.[3]

Although Mr. Delgado got to file a *pro. per.* supplemental brief after prior appellate counsel failed in his obligations, a *pro. per.* brief is not a substitute for the advocacy of

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[3] In *Penson*, Chief Justice Rehnquist's dissent stated that appointed counsel said he had conscientiously reviewed the record, "and we have no reason to disbelieve him." *Penson*, 488 U.S. at 91 (Rehnquist, Ch. J., dissenting). While this was not the test adopted by this Court in *Penson*, it is still worth noting that here, (prior) appointed counsel never said he "conscientiously" reviewed the record; and if he had, we would have had reason to disbelieve him. For in this case, appointed counsel failed to make any effort to obtain an augmented record as permitted by California law, in order to obtain a full record for determining whether there were any arguable issues. Despite this, prior counsel told his client that the appeal was "simply worthless." ER 256.

counsel. This Court has recognized this from at least *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and specifically recognized it for appeals in *Evitts v. Lucey*, 469 U.S. at 394.

Here, the state Court of Appeal did what is too easily done with *pro. per.* filings by people with little education or language skills: The Court gave little heed to the supplemental *pro. per.* brief, and didn't discuss any of it. The Court simply said it read the supplemental brief, it found no arguable issues, and the judgment was affirmed. ER 226-28 (reprinted at Petn. App. E, at A-45 - A-47). The state Court of Appeal may have found no arguable issues after reading Mr. Delgado's *pro. per.* supplemental brief, but it had no advocacy of counsel to guide it. That hardly vindicates respondent's fundamental right to counsel.

Petitioners claim Mr. Delgado received more from prior counsel than a conclusory statement that the appeal had no merit and counsel wouldn't file a brief. Petn. at 19. That is not true in any material sense, though it is true literally: Mr. Delgado also received advice that his appeal was "simply worthless," ER 256, when the appeal had meritorious issues which should have been easily spotted. Mr. Delgado also received the burden of having to make *pro. per.* arguments without transcripts, which were not sent to him. *See* ER 358-59. It is also true that Mr. Delgado received a rote recitation of procedure and facts from prior appellate counsel, though no facts favorable to Mr. Delgado. *See supra*, p. 7, fn. 1. That does not separate an unconstitutional brief from a constitutional one.

Were there any doubt on that last score, respondent would refer this Court back to *Ellis v. United States*, 356 U.S. 674, where the defendant received much more than Mr. Delgado. It didn't matter: Because the brief in *Ellis* had no advocacy, it failed the minimum standards for a no-merit brief. *See Anders*, 386 U.S. at 744-45. So did the no-merit brief here.

Petitioners sound a false alarm about California having to "restructure its entire judicial system" if California courts followed *Anders*, Petn. at 8, as the California Supreme Court always has. There are no facts on the "structure of the California judicial system" in the record of this case. A claim based on facts not in the record should be disregarded. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 n.3 (1986).

Respondent suspects petitioners' alarm is merely a recycled version of their theory of what the California Supreme Court supposedly required in *Wende*. Respondent answers again: *Wende* neither says nor implies what petitioners claim. On the issue of appointed counsel's duties of advocacy, *Wende* directly follows *Anders*. *See Sade C.*, 13 Cal.4th at 977-81. And the California Supreme Court recently reiterated that it follows *Anders* on this issue of advocacy, and has always done so. *Sade C.*, 13 Cal.4th at 980-81; *see supra*, pp. 15-16.[4]

Petitioners try to distinguish *Penson* on the ground that there were arguable issues in *Penson*. Petn. at 18. That is no distinction. As respondent has repeatedly stated and petitioners have never contested, this case has issues that are not only arguable, but clearly meritorious.

Beyond that, petitioners put the cart before the horse. If an appellate court mustdecide whether there are arguable issues before determining whether a no-merit brief complies with *Anders*, then *Anders* has no meaning. For a court to decide whether there are arguable issues, it must decide what the law is in the legal areas relevant to those issues, and how that law

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[4] Petitioners also try to broaden their self-created "conflict" or "split" by citing opinions from two other states, Oregon and Arizona, which eschew *Anders* as petitioners claim California supposedly does. Petn. at 14. Petitioners fail to mention that the California Supreme Court has expressly rejected the Oregon opinion, holding the Oregon Supreme Court "erred" by rejecting *Anders* and *Anders*' requirement of advocacy. *In re Sade C.*, 13 Cal.4th at 980 n.8 [rejecting *State v. Balfour*, 311 Or. 434, 814 P.2d 1069, 1079 (Ore. 1991)]. The Arizona case is from an intermediate court, and a petition for review is pending (no doubt awaiting this Court's opinion in *Smith v. Robbins* (U.S. No. 98-1037, cert. grd. March 8, 1999)).

relates to the record. If a court does that, it has done everything necessary to decide the issues, so it doesn't need *Anders*. But then it would still have to decide issues without advocacy from the appellant's counsel, again defeating the working of the adversarial system.

The paradigm established by this Court is much simpler. A no-merit brief must contain advocacy. But unlike a merits brief which contains advocacy by its very nature, a no-merit brief could be written either with or without advocacy. The *Anders/Penson* requirements ensure there is advocacy in a no-merit brief. They also help the reviewing court perform its twin functions after receiving a no-merit brief: Evidentiary, to show the reviewing court that counsel really was acting as an advocate even though counsel didn't engage in traditional advocacy (by arguing the merits), and advisory, to point the court to factual and legal areas which will help it in its review of the record, so the court can maximize the likelihood that it has protected the integrity of the judicial process and the defendant's right to counsel.

As matters stood, Delgado's right to counsel on appeal was utterly trampled, after his right to counsel at sentencing was trampled before it. Mr. Delgado didn't have the merits argued, even though he had meritorious issues. Mr. Delgado didn't even get the benefit of the minimum brief of an advocate. His prior appellate attorney also didn't request further record portions to make an intelligent decision on what to brief or not to brief. His prior appellate attorney didn't even bother to send him the transcripts. His prior appellate attorney thought a case involving a total denial of counsel had an appeal that was "simply worthless."

The only thing that was worthless was prior appellate counsel's brief. It contained no advocacy, it did respondent no good, and it did the reviewing court no good. By any standards, it flunked the minimum advocacy required by this Court and the Constitution.

B. Petitioners' AEDPA Claims

Apparently seeking to invoke the AEDPA, petitioners also claim that their erroneous view of California Supreme Court caselaw in other cases is not contrary to or an unreasonable application of this Court's law. Petn. at 12-13. As discussed above, petitioners are simply wrong about what California Supreme Court caselaw really says.

Beyond that, the AEDPA, 28 U.S.C. § 2254(d), doesn't have anything to do with what happened in other cases. It deals with whether the state court's ruling in this case is contrary to, or an unreasonable application of, clearly established law set forth by this Court.

In this case, on the one issue decided by the District Court and the Court of Appeals, the only relevant state court ruling was the state Supreme Court's postcard denial of respondent's habeas corpus petition alleging ineffective assistance of appellate counsel. No one can know what reasons or criteria the state Supreme Court used to deny the petition. The denial may well have been because the state Supreme Court has very selective criteria for review and this case didn't fit any. *See* Cal. R. Ct. 29.

Because there is no way to know what reasons or criteria the state Supreme Court used to deny the petition, there are no findings or conclusions below to which a federal court might give deference under the AEDPA. A court cannot defer to something that doesn't exist. The same is true on the denial of counsel and other issues not reached by the Court of Appeals below: The state Supreme Court's denial of review was summary, none of petitioner's issues were presented with benefit of counsel, and the state Court of Appeal gave no indication it engaged in full adversarial adjudication of any issues on the merits.

In making their various AEDPA arguments, petitioners also claim there is a distinction between this case and *Penson*, on the ground that appointed counsel sought to withdraw in *Penson*, but didn't do so here. Petn. at 16-18.

If that is a distinction, it is one without a difference. An attorney who engages in no advocacy, whether or not (s)he moves to withdraw, provides the same amount of advocacy: None. Neither course satisfies any constitutional requirement. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. at 685. "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *United States v. Cronic*, 466 U.S. at 654-55 [citation omitted].

The Court of Appeals was correct in holding that a summary denial with no reasons given is not entitled to deference under the AEDPA, because there was nothing to which to "defer." The only "opinion" was the state Supreme Court's summary denial of Mr. Delgado's habeas corpus petition, which stated no reasons. There was still no opinion to which to defer. And even if the summary denial with no reasons was entitled to "deference," "deference" doesn't mean "abdication." A federal court would still grant relief where, as here, the state court opinion was patently incorrect based on clearly established law of this Court.

Even if one were to consider the direct appeal, the result would be the same. The state Supreme Court summarily denied review with no reasons given. Previously, the state Court of Appeal issued an opinion summarily affirming, with no factual findings or legal conclusions, in a posture where the defendant had no advocacy of counsel (and didn't even have his transcripts). A felony proceeding without benefit of counsel is void. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). Again, there simply is nothing to which to defer.

Petitioners, however, summon up the words "independent review" in the Court of Appeals' opinion, as if they meant the Court of Appeals had made up its own law, rather than

following the AEDPA's edict that lower courts must follow "clearly established Federal law, as determined by the Supreme Court of the United States." Petn. at 19-20. They didn't. The District Court and the Court of Appeals used exactly the source of law the AEDPA requires, this Court's clearly established opinions such as *Anders* and *Penson*.

Petitioners also discuss the original opinion that was expressly withdrawn by the Court of Appeals, and terminology used in that opinion, as if a withdrawn opinion could have some sort of significance. *See* Petn. at 20. It has none. It is withdrawn, and is thus in no way the ruling of the Court of Appeals. *See, e.g., Gelfuso v. Bell*, 590 F.2d 754, 755 (9th Cir. 1978) [upon withdrawal, opinion becomes a nullity]. The discussion is thus inappropriate.

It has no merit anyway. In the context of the only opinion that exists (the June 23 opinion), "independent review" only means what the Court of Appeals held: When the state court has not engaged in adversarial adjudication and thus has not made any findings or conclusions, a federal court has nothing to which to defer. In that event, it decides for itself--*i.e.*, independently--whether the state decision was contrary to or an unreasonable application of clearly established law of this Court. *See Delgado v. Lewis*, 181 F.3d at 1091 & n.3.

Petitioners claim some sort of conflict on an issue of whether a state court opinion requires reasoning to warrant deference under the AEDPA. *See* Petn. at 21-24. That is a non-issue in this case, and it is based on a mischaracterizion of caselaw.

None of the cases petitioners cite for the "conflict," Petn. 21 [last partial par.]-22 [top partial par.], stand for what they claim. In *Hollman v. Wilson*, 158 F.3d 177, 180 n.3 (3d Cir. 1998) (cited in Petn. at 21-22), the state court held an evidentiary hearing on the relevant claim, then rejected it based on specific conclusions. That doesn't implicate petitioners' issue.

Parker v. Angelone, 959 F.Supp. 319, 322-323 (E.D. Va. 1997) and *McLee v. Angelone*, 967 F.Supp. 152, 156-57 (E.D. Va. 1997) (cited in Petn. at 22), both of which had at least some ruling on the merits that didn't exist here, have been overruled on this point by the Fourth Circuit, which governs the Eastern District of Virginia. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.) [cited with approval in *Delgado v. Lewis*, 181 F.3d at 1091], *cert. denied*, 67 U.S.L.W. 3374 (U.S. Dec. 3, 1998); *accord Wilson v. Moore*, 178 F.3d 266, 280-81 (4th Cir. 1999) (following *Cardwell*). Again, neither of these opinions creates a conflict.

Indeed, the Fourth Circuit's holding in *Cardwell* fully supports respondent: "[B]ecause the state court decision fails to articulate any rationale for its adverse determination of Cardwell's claim, we cannot review that court's application of 'clearly established federal law,' but must independently ascertain whether the record reveals a violation of Cardwell's Sixth Amendment right to the effective assistance of counsel." 152 F.3d at 339.

Petitioners' other cases are clearly irrelevant here. *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998), cited in Petn. at 22, involves the different issue of what source of law is used in a federal court's collateral review. It is self-evident that only clearly established law of this Court may be used. The District Court and Court of Appeals did so here, as *Anders*, *Penson*, and other relevant opinions have long been clearly established by this Court. And *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997), cited in Petn. at 22, involved review of a claim specifically discussed by a state court in a written opinion, with no indication the defendant was denied his right to an advocate. That has nothing to do with this case.

In short, there is no conflict among the courts on the "issue" proffered by petitioners. But none of this should matter here anyway. The only issue here is what if any effect 28 U.S.C. section 2254(d) has on this case. Section 2254(d) states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

On the one issue decided by the District Court and the Court of Appeals, the state court decision not to grant relief was "contrary to . . . clearly established Federal law, as determined by [this Court]." The "clearly established federal law, as determined by [this Court]" was *Anders*, decided in 1967, and *Penson*, decided in 1988. That mandates relief.[5]

As to the issues not decided in the Court of Appeals opinion, the denial of counsel, conflict of interest and ineffective assistance of appellate counsel issues discussed in Parts I-III above, the result is the same, and petitioners have never argued otherwise. *Strickland v.*

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[5] The "unreasonable application of clearly established law of [this Court]" prong of section 2254(d)(1) doesn't apply, because there is nothing to show that the state court decision ever tried to "apply" the law of this Court. Something cannot be an unreasonable "application" if there was no "application" in the first place. Moreover, since the word separating the two clauses of section 2254(d)(1) is "or" and not "and," only one of those two clauses needs to be satisfied for the writ to issue. Here, the "contrary to" clause is satisfied. However, even if one were to use the "unreasonable application" clause, the result would be the same: Prior appellate counsel's brief violated the clearly established law of cases such as *Anders*, *Penson* and *Ellis*. Had the state court believed otherwise, the belief would have been unreasonable. The requirements of this Court's prior cases (*Anders*, *Penson*, *Ellis*, etc.) are clear, and prior appellate counsel's brief obviously didn't meet them.

Washington, *United States v. Cronic*, *Evitts v. Lucey* and like cases have long been the law clearly established by this Court. The violations described above are patently contrary to it.

With abdication of counsel at sentencing, and again on appeal, this case is as egregious an example of constitutional violations as there could be. If the AEDPA barred relief in this very extreme case, then it would seem no state case could result in federal habeas relief. That is probably impossible. *See* U.S. Const., Art. I, § 9, cl. 2 [Suspension Clause]; *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). It is certainly not what Congress did in the AEDPA.

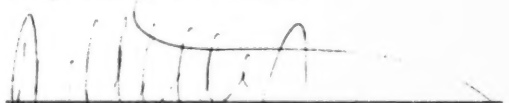
SEPARATE GROUNDS FOR AFFIRMANCE

If the petition were to be granted, then respondent asks this Court also to consider the issues in Parts I, II and III above, as separate grounds for affirmance. A respondent is entitled to make such a request without a cross-petition. *Reno v. Flores*, 507 U.S. 292, 300 n.3 (1993); *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). A respondent may support the judgment on any grounds, whether or not decided below. *Ibid.*; *see generally United States v. American Express Ry. Co.*, 265 U.S. 425, 435 (1924).

These are the same issues respondent raised as alternative grounds for affirmance in the Court of Appeals. *See* Appellee's Br. 41-63. He does so again here. Respondent asks this Court to affirm on these grounds, for the reasons in this answer. *Supra*, Parts I, II and III.

Dated: October 17, 1999.

Respectfully submitted,



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Counsel of Record for the Respondent

Appendix A

Transcript Excerpts Of Respondent's Sentencing
(See Answer To Petition, p. 2)

MR. MORRIS: Your Honor, Mr. Cuevas has also indicated to me he is requesting that he be ordered transferred immediately to state prison.

THE COURT: I'll order his transportation forthwith to California State Prison.

MR. MORRIS: Thank you.

THE COURT: Thank you very much.

DEFENDANT JUAN CUEVAS: Thank you, your Honor.

THE COURT: Let's see. It's 12 noon right now, counsel. I know that Mr. Vodnoy has an obligation in another court at 1:30 in Los Angeles; is that correct, sir?

MR. VODNOY: Yes, your Honor -- West Covina.

MR. CURRIE: I do also, your Honor, at 1:30 Pomona court.

THE COURT: All right. So that's Enrique Galvan, is that correct?

MR. CURRIE: Yes.

THE COURT: You have a jury trial also?

MR. WAITMAN: Department 8 at 10:30.

THE COURT: At 10:30, yeah.

Well, will the staff mind if we stayed here for a while? All right, we will keep going.

In the matter of Jesus Garcia Delgado.

MS. BRZUSKA: Yes, your Honor. I'm appearing.

THE COURT: You're appearing on behalf of Mr. Haynal?

MS. BRZUSKA: Yes.

THE COURT: The Court has before it the probation, -- the weekly report prepared and filed by the probation office that I've read and considered. I've received no other documentation in connection with this case. Let me give you an indicated sentence to -- the Court in this case would -- is thinking 15 years, which is the limit of the plea agreement we reached previously. You may respond to that if you desire.

MS. BRZUSKA: Your Honor, I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get.

THE COURT: All right. Mr. Hidalgo, any comments?

MR. HIDALGO: I think I've said enough already.

THE COURT: All right. In this matter, the Court will make the following findings: A motor vehicle was not involved. The defendant does not have the ability to reimburse the county for court-appointed counsel fees or investigation costs or other fees. I will order a $1,000 restitution fine. That will be imposed.

The Court finds in this case that the facts in aggravation outweigh those in mitigation. Mr. Delgado, though not "Mr. Big," is, in the Court's view -- has been identified, I think, in the probation report as the subchief of this operation. That is my belief as well. At the age of 45, this man, though without prior criminal record, was deeply invested in this operation. The manner in which this operation was carried out indicates prior planning. It indicates

sophistication. And Mr. Delgado admitted to playing a role in the precursors to finished meth oil.

The crime involves a great quantity of contraband, 35 pounds of finished methamphetamine, seized under the search warrant. The only mitigating factor is the fact that he had no prior criminal record.

The Court will, therefore, sentence the defendant pursuant to our agreement as follows: On Count 1, the manufacturing of methamphetamine, violation of Section 11379.6(a) of the Health and Safety Code, the middle term of five years. With the enhancement of exceeding 400 liters, 105 gallons by volume, violation 11370.4 --

MR. HIDALGO: That's incorrect.

THE COURT: Strike that. It's the 10-year enhancement. It is the enhancement of a substance exceeding 25 gallons, Section 11379.8, of 10 years on Count 1. On Count 2, the possession of Ephedrine with intent to manufacture, violation of Health and Safety Code Section 11383, the middle term of four years to be served concurrent to that time served in Count 1. On Count 3, possession of methamphetamine for sale, violation of Section 11378 of the Health and Safety Code, the middle term of two years, to be served concurrent with time required to be served in Counts 2 and 1.

So total time -- we had the enhancement of

manufacturing of 105 gallons in Count 1. That's to be stricken, and that will be stricken. We agree that that was an improper allegation as to Count 1; is that correct?

MR. HIDALGO: Yes.

THE COURT: All right. That will be stricken. The other enhancements -- you alleged enhancements in Counts 3 as well; is that correct?

MR. HIDALGO: Yes.

THE COURT: Those enhancements, pursuant to Penal Code Section 11370.1, will be stayed pending the successful completion of the sentence agreed upon in this court and now imposed upon the defendant. And upon the successful completion of those sentences, those will be permanent stays.

That should do it. Is there anything else in relation to Mr. Delgado?

MR. HIDALGO: I believe that is it, your Honor.

THE COURT: Mr. Delgado, good luck to you, sir.

DEFENDANT DELGADO: Thank you.

THE COURT: The credits are the same as the codefendants. 230 actual, 115 good conduct, for total of 345 credits for time served.

MR. HIDALGO: To be followed by a period of parole.

THE COURT: To be followed by three to four years prison parole. Yes. Thank you.

In the matter of Carlos Angino. Mr. Vodnoy.

MR. VODNOY: Yes, your Honor.

THE COURT: Mr. Vodnoy, it's difficult to say, based upon the statements of all these defendants, who's who and what's what with regard to this lab. There's a lot of finger pointing with one exception, and that was Jesus Delgado. He is the one guy that did assume responsibility. That's the one man who in some ways said it like it was.

Appendix B

Statement Of Petitioners' Counsel
***National Law Journal*, March 22, 1999**
(See Answer To Petition, p. 1)

Monday, March 22, 1999

Fed. judge blasts Calif. defense pair

But even the government says 9th Cir. got it wrong.

BY DAVID E. ROVELLA
NATIONAL LAW JOURNAL STAFF REPORTER

THE FIERY DENUNCIATION of two California lawyers by a federal appeals court has spurred an unlikely alliance between a prosecutor and two defense lawyers against a federal judge and a convicted methamphetamine manufacturer.

In a Feb. 23 ruling affirming the granting of Jesus G. Delgado's habeas petition, Judge Sidney R. Thomas, of the U.S. Court of Appeals for the 9th Circuit, said that the "absence of any meaningful legal assistance" by court-appointed trial lawyer Andrew J. Haynal, of Redlands, Calif., and appellate counsel Christopher J. Blake, of San Diego, "makes a mockery of the representation of indigent defendants contemplated by the Supreme Court."

He railed against Mr. Haynal's absence from most of Mr. Delgado's court appearances after the defendant's 1994 arrest, leaving his client in the hands of other lawyers, whose clients had conflicting interests. The judge blasted Mr. Blake's failure to base Mr. Delgado's appeal on ineffective assistance of counsel, noting acidly that while one of the five co-defendants who plead guilty received probation, Mr. Delgado, with no lawyer at his sentencing and no criminal record, received the maximum 15 years. The judge concluded that to turn down Mr. Delgado's petition would "render the clear sound of Gideon's trumpet quiet and meaningless as wind in dry grass."

'Wende' procedure

California Deputy Attorney General Sabrina Y. Lane, who filed a petition for rehearing en banc, calmly dismissed the opinion's hyperbole while coming to the defense of Messrs. Haynal and Blake.

"Having somebody stand in is very common in the trial courts, certainly in the context of a preliminary hearing and sentence," she said. As for Mr. Blake, she added that "he did exactly what he should have done under California's *Wende* procedure. In fact, the defendant received a higher level of review than if [Mr. Blake] had raised a single question."

Under *People v. Wende*, explained Mr. Blake, if a defendant appeals but there are no nonfrivolous grounds, a lawyer in California can leave it to the state appeals court to make an independent review of the facts. Mr. Blake countered Judge Thomas' admonitions by saying that the ineffective-assistance-of-counsel issue is usually raised in a habeas petition, as it was in this case, and that by following *Wende*, he allowed the state appeals court to look at any issue it thought pertinent. "The 9th Circuit made no attempt to educate itself as to what the *Wende* procedures are," said Mr. Blake. Mr. Haynal did not return calls.

But Mr. Delgado's current lawyer, Michael B. Dashjian, of Solvang, Calif., said that Mr. Haynal's absences and Mr. Blake's failure to raise the ineffective-assistance-of-counsel issue resulted in his client going without effective representation for "a good three years."

Appendix C

Respondent's Motion To Augment The Record
In The State Court Of Appeal After Grant Of Habeas
(See Answer To Petition, pp. 8, 21)

MICHAEL B. DASHJIAN
State Bar No. 111072
LAW OFFICES OF MICHAEL B. DASHJIAN
606 Alamo Pintado Rd. Suite 119
Solvang CA 93463
(805) 686-0700

Attorney for Appellant
Jesus Delgado

FILED
OCT 14 1997
COURT OF APPEAL FOURTH DISTRICT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESUS DELGADO, Defendant and Appellant	Court of Appeal No. E016476 (San Bernardino County No. FSB 05856)

APPLICATION TO AUGMENT THE RECORD ON APPEAL AND FOR EXTENSION OF TIME

TO THE HONORABLE MANUEL RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Pursuant to Cal. R. Ct. 12(a), appellant Jesus Delgado, through his undersigned counsel, respectfully requests that this Court augment the record to include the materials below.

This is an appeal from a judgment of conviction based on a plea of guilty, as part of a six-defendant plea agreement, to one count of manufacture of methamphetamine, in violation of Health and Safety Code section 11379.6; one count of possession of chemicals with intent to

COPY

manufacture, in violation of section 11383; and one count of possession of methamphetamine with intent to sell, in violation of section 11378, with weight enhancements under sections 11379.8 and 11370.4, subdivision (b). Appellant was sentenced to a term of 15 years.

In appellant's original appeal, a brief was filed by (former) appellate counsel pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and a supplemental brief was filed by appellant *pro. per.* This Court affirmed the judgment on December 18, 1995. (Aug. CT 2.) After the Supreme Court's denial of appellant's petition for review, the remittitur issued in this Court on March 19, 1996. (Aug. CT 1.)

Subsequently, on July 2, 1997, appellant's petition for a writ of habeas corpus to the U.S. District Court for the Central District of California was conditionally granted based on a finding of ineffective assistance of counsel, subject to the reinstatement of appellant's appeal. (*Deglado v. Lewis* [No. CV-96-7241-R (RNB)] [copy of orders and ruling in Court of Appeal file].) Based on the U.S. District Court's order, this Court reinstated the appeal, and appointed the undersigned as new counsel.

This appeal is the reinstatement of the appeal from the judgment. Appellant remains under a sentence of 15 years, and is currently incarcerated.

Because of the unusual posture of this appeal; in order to ensure all potentially arguable issues on appeal have been evaluated; in order to ensure appellant's Sixth Amendment right to effective assistance of counsel is maintained in this appeal; and in order for current appellate counsel to fulfill his Sixth Amendment duty of providing proper legal advice to his client (since a successful effort to challenge a plea of guilty in this case could subject appellant to a potentially higher sentence, *see, e.g., People v. Aragon* (1994) 11 Cal.App.4th 749, 759-760; *People v. Romanoski* (1984) 157 Cal.App.3d 353, 363) [withdrawal of guilty plea waives double jeopardy

protection against higher sentence on appeal]), appellant would respectfully ask that the record be augmented as follows:[1]

A. Supplemental Clerk's Transcript

1. All certificates of probable cause to appeal, with accompanying applications. The U.S. Magistrate's Recommended Ruling refers to a request by trial counsel for a certificate of probable cause to appeal, and a grant of the certificate of probable cause, on an issue which appears to go to the voluntariness of appellant's plea. (Rec. Ruling filed 5/28/97, p. 16-17 & fn. 6.) The certificate would directly affect the issues appellate counsel could raise on appeal, under Rule 31(d) and Penal Code

---

[1] In requesting this extensive set of materials for a case that was originally disposed of by a *Wende* brief and no-issue ruling, appellant does not make any argument concerning any prior action in this appeal or whether any such action was inappropriate. (That would seem irrelevant here, with the appeal having been reinstated.) Current appellate counsel is operating with the benefit--and the burden--of the U.S. District Court's ruling. The District Court has identified specific issues which it apparently expects current appellate counsel to explore, so it is very easy for the undersigned to follow the District Court's identification of issues, which is a benefit that no one had in the prior appeal. However, the undersigned counsel also feels he has no choice but to evaluate those issues, because of the explicit nature of the District Court's ruling. That does not necessarily mean these issues will end up being briefed on appeal. But if appellate counsel ends up rejecting a potential issue identified by the District Court, he would want to do so with a full understanding of what that issue would have been and why it is appropriate to reject it.

It is also fairly clear that this appeal has the potential of being further scrutinized by the District Court if the matter gets that far again. In that light, appellate counsel would consider it prudent to err on the side of caution and overinclusion in any event.

Because of the extensive nature of this request and the multi-defendant nature of this case, appellate counsel would note here for the benefit of the Superior Court Clerk's Office that he would extend his full cooperation to that office in clarifying any items as to which the Clerk's Office is unclear.

section 1237.5, and thus would be an important document in this appeal. The application for the certificate would be important as well, in that it would indicate an issue that trial counsel and the trial court found arguably nonfrivolous, which appellate counsel would be required to evaluate.

The certificate of probable cause is part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(a).

2. All motions to suppress under Penal Code section 1538.5, and other motions addressed to the search warrant, with supporting and opposing papers, and any joinder by appellant's trial counsel. (Motion heard January 18, 1995.) The District Attorney stipulated to appellant's standing to join these motions (CT 96); thus, the motions are deemed to have been made by appellant.

As a result, all moving papers for the section 1538.5 and related motions are part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*). There is a potential issue as to whether appellant waived his right to appeal the denial of the section 1538.5 motion in conjunction with his plea, which appellant may have to address, although there are also potential issues as to whether appellant understood what he was waiving; since as the U.S. District Court found in its Ruling, there are potential issues as to the voluntariness of appellant's plea, as to which the trial court apparently granted a certificate of probable cause. (Rec. Ruling at pp. 16-17 & fn. 6.) If there is an argument that such appeal was not waived, or that the plea was involuntary, then appellant needs the section 1538.5 documents in the record to be able to raise the issue on its merits.

Note: Other defendants' moving papers may be found in the other defendants' files, apparently under the same Superior Court docket number [though under different sub-numbers].

3. All motions to sever, disclose confidential informants or reveal the contents of search warrants, and quash and traverse search warrants,

with supporting and opposing papers, and any joinder by appellant's counsel. These were the other motions heard on the same day and at the same time as the section 1538.5 motion, and are requested for the reasons in Item (2) above.

4. All motions under Penal Code section 995, with supporting and opposing papers, and any joinder by appellant's trial counsel. (Motion heard January 13, 1995.) The minute order for that date states that appellant joined in the other defendants' motions (CT 94); thus, the motions are deemed to have been made by appellant. As a result, all moving papers for the section 995 motion are part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*). Appellate counsel also requests the papers in order to be able to evaluate possible trial defenses, based on his need to advise his client intelligently with respect to a possible challenge to his plea, since a successful challenge to the plea could subject appellant to a higher sentence if the case was eventually tried.

Note: Other defendants' moving papers may be found in the other defendants' files, apparently under the same Superior Court docket number [though under different sub-numbers].

5. All statements in mitigation, statements in aggravation, and other documents pertaining to sentencing as to appellant. If these documents exist, they would be part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*) or part of the optional record on appeal under Cal. R. Ct. 33(b)(1).

If the documents exist, they would also be necessary as part of an issue on appeal that the U.S. District Court specifically raised in the Recommended Ruling (adopted as the Court's final ruling), namely, trial counsel's failure to appear on his client's behalf at sentencing, and his action in turning his client over to a co-defendant's counsel who appeared to have a conflict of interest. (*See* Rec. Ruling, pp. 15-16 & fn. 5.)

What type of presentation trial counsel made on his client's behalf for sentencing purposes is an integral part of that issue, and any statements in mitigation by appellant's trial counsel would directly affect that issue. Any statements in aggravation by the People would be requested in order to evaluate the issue fully. [Note: Statements in aggravation by the People could possibly be found in other defendants' files, apparently under the same Superior Court docket number, but under different sub-numbers.]

If there were no statements in mitigation filed by trial counsel, the nonexistence of such documents would also be highly relevant to any issue dealing with trial counsel's failure to represent his client at sentencing. The Superior Court clerk's affidavit stating that no such documents exist would therefore be an important part of the appellate record as well.

6. All statements in mitigation, statements in aggravation, and other documents (including letters) pertaining to sentencing as to defendant Jose Cuevas Jr. (These documents are presumably in the sub-file under this Superior Court docket number pertaining to Mr. Cuevas.)

These documents pertain to the same potential issue raised in the Magistrate Judge's Recommended Ruling, which was adopted by Judge Real as the basis for the U.S. District Court's conditional grant of habeas corpus.

The District Court noted that appellant's trial counsel did not appear on his behalf at sentencing. Rather, a "special appearance" was made for appellant at sentencing, by the trial attorney for defendant Jose Cuevas Jr., who made no argument and no statement in mitigation, and merely submitted the case. The Recommended Ruling noted as part of this issue that this co-defendant's attorney appeared to have a conflict of interest. (*See* Rec. Ruling at pp. 15-16 & fn. 6.)

Based on appellate counsel's independent review of the record, it does appear that co-defendant's counsel who appeared for appellant at sentencing may in fact have had a conflict of interest. The plea agreement

was a package deal for all six defendants, which appeared to involve prison sentences for each. However, co-defendant's counsel proposed a novel sentencing arrangement for her client, by which her client would get probation--even though the offense was presumably probation-ineligible--and her client's father, also a co-defendant, would serve the prison time that his son would have received had the plea agreement been carried out as expected. The father agreed to serve his son's prison time, and was given a higher sentence. Over the prosecutor's strenuous objection, the trial court accepted that arrangement, and this co-defendant received probation.

Since co-defendant's counsel was fully aware that she was going to seek this extraordinary arrangement for her client, her client's best interests would have been that none of the other defendants received any unusual or unexpected dispositions, to maximize the likelihood that the prosecutor would not seek to undo the entire plea bargain. In other words, it was in co-defendant's counsel's interest that none of the other defendants, including appellant, "rock the boat."

Thus when co-defendant's counsel made her "special appearance" for appellant, it was in her client's best interest that she say nothing at all on appellant's behalf, because it was in her client's best interest that appellant not receive a mitigated disposition. This raises a significant possibility that trial counsel not only failed to perform his role as counsel for his client's sentencing, but he turned his client's sentencing over to an attorney who had a conflict of interest. These present a potential issue on appeal that appellate counsel must explore in light of the U.S. District Court's ruling.

Because the above documents would shed light on whether and to what extent co-defendant's counsel may have had a conflict of interest, appellant respectfully requests that they be augmented into the record here. The current Reporter's Transcript does indicate that such statements in mitigation exist. (RT 67.)

B. Supplemental Reporter's Transcript

7. Reporter's transcript of proceedings, January 13, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter L. Meekins; *see* Minute Order, Clerk's Transcript, p. 94.)

These are the oral proceedings on the section 995 motion. Appellant requests that these be augmented into the record for the same reasons as set forth in Item (4), above.

8. Reporter's transcript of proceedings, January 18, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter D. Alvino; *see* Minute Order, Clerk's Transcript, pp. 95-96.)

These are the oral proceedings on the section 1538.5 and related motions. Appellant requests that these be augmented into the record for the same reasons as set forth in Items (2)-(3), above.

9. Reporter's transcript of proceedings, February 24, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter L. Meekins; *see* Minute Order, Clerk's Transcript, p. 98.)

One of the issues discussed in the federal District Court's ruling was the voluntariness of appellant's plea, as to which, according to the District Court's ruling, trial counsel applied for and the trial court granted a Certificate of Probable Cause. (Rec. Ruling, pp. 16-17, fn. 6.) This transcript would be directly relevant to that issue, because the minute order for that date says: "Deft. rejects offer--if def. wishes to accept Atty to notify DA by 3-3-95." (CT 98.) The fact that defendant rejected a plea offer a few days before his plea would be directly relevant to any issue pertaining to the voluntariness of appellant's plea. Accordingly, appellant would request the transcript.

10. Reporter's transcript of proceedings, April 19, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter D. Alvino.) This appears to have been a routine postplea continuance of proceedings for

sentencing. Because any proceeding after the plea may shed relevance on the voluntariness of the plea, and to complete the record on any such potential issue, appellant would respectfully ask that a transcript of this proceeding be made available as well.

All of the materials above are requested in order to ensure appellate counsel can properly discharge his Sixth Amendment duties to his client, and that the defendant's right to a meaningful appeal is protected under the Fourteenth Amendment.

C. Request for Extension of Time

Appellant respectfully requests that the time for filing the opening brief be extended to 30 days after the filing of the supplemental record, in order to ensure that appellate counsel has an adequate opportunity to review these materials and incorporate them into the opening brief if appropriate, and to counsel his client based on a review of the full record.

For these reasons, appellant would respectfully request that his motion be granted, and that the time for filing the appellant's opening brief be extended to 30 days after the filing of the supplemental record.

Dated: October 11, 1997.

Respectfully submitted,

Michael B. Dashjian
Counsel for Appellant Jesus Delgado
(Appellate Defenders - Independent Case)

DECLARATION OF SERVICE BY MAIL

I, MICHAEL B. DASHJIAN, declare as follows:

I am an active member of the State Bar of California, over the age of 18 years and not a party to the within action. My business address is 606 Alamo Pintado Rd., Suite 119, Solvang, California 93463. On October 11, 1997, I served the attached Application to Augment the Record on Appeal and for Extension of Time by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail, with postage thereon fully prepaid.

Office of the Attorney General
110 West A Street Suite 700
P.O. Box 85266
San Diego CA 92186-5266

Appellate Defenders, Inc.
233 A Street Suite 1200
San Diego CA 92101

Clerk of the Superior Court (Appeals Unit)
County of San Bernardino
351 N. Arrowhead Ave.
San Bernardino CA 92401

A copy was also sent on this day to the appellant, Jesus Delgado.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed at Solvang, California on this 11th day of October, 1997.

MICHAEL B. DASHJIAN

Appendix D

Petitioners' Objection To Respondent's Motion To Augment The Record In The State Court of Appeal After Grant Of Habeas

(See Answer To Petition, p. 21)

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
LAURA WHITCOMB HALGREN
Supervising Deputy Attorney General
SABRINA Y. LANE
Deputy Attorney General
State Bar No. 167819

P.O. Box 85266
110 West A Street, Suite 1100
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Telephone: (619) 645-2565

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	E016476
Plaintiff and Respondent,	S.C. No. FSB 05856
v.	
MICHAEL RAY FOSTER	
Defendant and Appellant.	

OPPOSITION TO APPELLANT'S MOTION TO AUGMENT THE RECORD ON APPEAL

TO THE HONORABLE MANUEL RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant requests that this Court augment the Clerk's Transcript on appeal to include the following: all certificates of probable cause and accompanying applications, all motions to suppress evidence and other motions relevant to the search warrant,

all motions to sever, disclose confidential informants or reveal the contents of search warrants, and quash and traverse search warrants, all motions under Penal Code section 995, and all statements in mitigation, aggravation, and other documents pertaining to sentencing for appellant and codefendant Jose Cuevas, Jr. Appellant requests that this Court augment the Reporter's Transcript on appeal to include the following: the oral proceedings on the Penal Code section 995 motion, the oral proceedings on any motion to suppress evidence, any oral proceedings regarding appellant's rejection of the prosecution's offer to plead guilty, and oral proceedings for a post-plea continuance of sentencing.

Augmentation of the appellate record is available for portions "of the original superior court file . . . ." (California Rules of Court, rule 12.) In order to justify augmentation of the record on appeal, a litigant must signify with some certainty how materials not included in the normal transcript may be useful on appeal. (*People* v. *Gaston* (1978) 20 Cal.3d 476, 482, citing *People* v. *Hill* (1967) 67 Cal.2d 105, 124.)

Here, the Certificate of Probable Cause and application are included in the Supplemental Clerk's Transcript. (Supp. CT 1-2.) Thus, there is no need for augmentation to include these documents. Respondent does not oppose augmentation to include any motions to suppress evidence. (See Cal. Rules of Court, rule 33(a)(1)(l).) Respondent does not oppose augmentation to include any written motion <u>made by the defendant</u>, as those items are regularly included in the Clerk's Transcript. (See Cal. Rules of

Court, rule 33(a)(1)(l).) However, appellant fails to establish how motions brought by coparticipants would be relevant to appellant's appeal. Thus, respondent opposes augmentation to include written motions brought by coparticipants in which appellant did not join. In light of the district court's ruling, Respondent does not oppose augmentation to include statements in aggravation or mitigation pertaining to appellant or codefendant Cuevas, Jr.

Respondent opposes augmentation to include the oral proceedings on the section 995 motion, as these proceedings are not normally included in the Reporter's Transcript, and appellant fails to identify how the oral proceedings would be of assistance on appeal. Furthermore, the section 995 motion occurred prior to the guilty plea. Respondent does not oppose augmentation to include the oral proceedings of any motion to suppress evidence that appellant brought or joined. In light of the district court's ruling, respondent does not oppose augmentation to include any oral proceedings of appellant's rejection of the prosecution's offer to plead guilty, or any oral proceedings of a continuance of the sentencing hearing.

Based on the foregoing, respondent respectfully requests that appellant's request for augmentation be denied in part and granted in part.

DATED: October 17, 1997, San Diego, California.

SABRINA Y. LANE
Deputy Attorney General

SD95DA1130

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Michael Ray Foster No. E016476

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266.

On October 17, 1997, I served the attached

OPPOSITION TO APPELLANT'S MOTION TO AUGMENT THE RECORD ON APPEAL

in said cause, by placing a true copy thereof enclosed by depositing it in the internal mail collection system at the Office of the Attorney General, 110 West A Street, Suite 1100 P.O. Box 85266, San Diego, California 92186-5266, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

Michael B. Dashjian (2 copies)
Attorney at Law
606 Alamo Pintado Rd., Suite 119
Solvang, CA 93463

Appellate Defenders, Inc.
233 A Street, Suite 1200
San Diego, California 92101

I caused a true and correct copy of the above document to be deposited with (1) the Clerk of the Court from which the appeal was taken, to be delivered by said Clerk to the Judge who presided at the trial of the cause in the lower court, and (2) a copy to the District Attorney for the County of San Bernardino.

I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on October 17, 1997.
(Date)

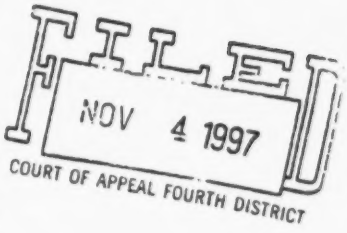
Anna Herrera
(Typed Name)

Anna Herrera
(Signature)

Appendix E

State Court of Appeal's Order Granting Respondent's Motion To Augment The Record After Grant Of Habeas
(See Answer To Petition, p. 21)

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO



PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	E016476
v.	)	(Super. Ct. No. FSB5856)
JESUS GARCIA DELGADO, Defendant and Appellant.	)	County of San Bernardino

THE COURT

This court has read and considered appellant's motion filed October 14, 1997, to augment the record on appeal, the respondent's opposition to the motion, and the appellant's reply to the opposition. The court has determined that this entire request is reasonable, based on appellant's motion and reply and the decision of the federal court in its writ of habeas corpus. The motion is GRANTED, and the superior court clerk is DIRECTED to file with the clerk of this court, on or before 45 days following the date of this order, supplemental clerk's and reporter's transcripts of the documents and oral proceedings described in the motion, a copy of which is attached to this order. The superior court clerk is also DIRECTED to notify the reporter or reporters of this order within five days of its date and to furnish counsel of record with copies of the augmentation.

Appellant is GRANTED an extension to serve and file the appellant's opening brief on or before 30 days following the filing of the augmentation with this court.

RAMIREZ

Presiding Justice

cc: See attached list

COPY